3962

No. ~~3920~~

United States Circuit Court of Appeals

13

For the Ninth District

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a CORPORATION,

Appellees.

Brief of School District No. 1 and Its Officers, Appellees

Upon Appeal from the United States District Court for the District of Oregon.

STANLEY MYERS, District Attorney,
SAM'L H. PIERCE, Deputy District Attorney,
Attorneys for School District No. 1, and its officers.

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STATEMENT OF FACTS

Supplementing the statement of facts found in the appellant's brief the appellees, School District No. 1 and its officers, desire to call the attention of the honorable court to the following additional facts:

Holladay Public School, one of the oldest schools of the district, was destroyed by fire in the Spring of 1922. It was located upon Block 77, Holladay Addition. This property is now occupied by the new administration building of the district. The district also owned Block 96, adjoining. The replacement of the school became a matter of immediate concern to the district and the purchase of Blocks 95, 97 and 98 was decided upon. In view of the size of the new school building (20 rooms) and the necessity for play ground for the children, the entire space represented by the four blocks and the intervening streets, 460 x 460 feet was deemed necessary. A price was agreed upon with the owner of the three blocks above mentioned, the Oregon Real Estate Company, and the district petitioned the city council to vacate the intervening streets. The Oregon Real Estate Company gave its written consent to the vacation and the city council vacated the streets by ordinance.

The purchase has been completed by the district and the plans for the school building are ready for bids.

The immediate vicinity of the proposed school site has not developed. The blocks purchased by the district are vacant and there are very few residences upon the adjoining blocks.

Point 1.

Although the proprietor, who files a plat as

provided by statute and sells lots therein with reference thereto, is held to have dedicated all streets to the public, which dedication is irrevocable by the act of the dedicator,

Section 3809, Oregon Laws,
Christian vs. Eugene, 49 Or. 170,
Schooling vs. Harrisburg, 42 Or. 497,
Sandstrom vs. O-W etc. Co., 75 Or. 159,

he is not estopped from initiating proceedings for the vacation of lots or streets in the plat,

Section 3819, et seq. Oregon Laws

and the county or city authorities are authorized to order a vacation upon a proper petition, "if in their opinion justice requires it."

Section 3821 Oregon Laws.

Point 2

The effect of the proceedings vacating Eighth Street and Clackamas Street (exhibits "E" and "F," Transcript of record) was to protect the school district from the charge of maintaining a public nuisance and to protect it to the extent of the pubilc right of easement in the street, but does not affect the damages to be assessed for the invasion of private rights, if any.

Sandstrom vs. O-W etc. Co., 75 Or. 159, 162.
Willamette Iron Wks. vs. ORN Co. 26 Or.232
Kurtz vs. So. Pac. 80 Or. 213.

Point 3.

The great weight of authority is against the so-called "unit rule" contended for by the appellant. The prevailing rule is that the purchaser of a lot according to a plat acquires an easement only in such streets and alleys laid down on the plat as are necessary for the reasonable and convenient enjoyment of the lot conveyed.

Roberts vs Matthews, 137 Ala. 523, 34 So. 624
Field vs Bartling, 149 Ill. 556, 37 N. E. 850
Highbarger vs Milford, 71 Kans. 331, 80 Pac. 633
Regan vs Boston Gas Lt. Co., 137 Mass. 37
Diamond Match Co. vs Ontonagon, 72 Mich. 249, 40 N. W. 448
Dodge vs Penn. R. R. Co., 43 N. J. Eq. 351
Kerrigan vs Baccus, 69 App. Div. 329, 74 N. Y. Sup. 906
Madden vs. Penn. R. R. Co., 21 Ohio C.C., 73
State vs Hamilton, 109 Tenn. 276, 70 S. W. 619

Some cases hold that the purchaser acquires the right to have the street on which his property abuts kept open to the next connecting street in each direction and no further,

Canton Co. vs Baltimore, 106 Md. 69

Glasgow vs St. Louis, 107 Mo. 198, 17 S. W. 743
Reis vs New York, 188 N. Y., 58, 80 N. E. 573
Horton vs Williams, 99 Mass. 423, 428
Pearson vs Allen, 151 Mass. 79
Mayor of Baltimore vs. Frick, 82 Md. 77
Highbarger vs Milford, 71 Kans. Sup. Ct. Rep. 331, 340
City of East St. Louis vs O'Flynn, 206 Ill. 200, 206

Point 4.

The "unit rule" has been applied in cases where courts have been called upon to preserve park spaces from the encroachments of dedicators.

19 C. J. (Easements) p. 935 and cases cited.

And the Oregon court has used language similar in kind in deciding cases relating to parks.

Carter vs Portland, 4 Or. 339
Steele vs City of Portland, 23 Or. 176

Point 5.

But in defining the rights of a lot owner in a dedicated street which had been vacated by the municipal authorities, the Oregon court does not adhere to the unit rule as contended for by the appellant.

Sandstrom vs O-W etc. Co., 75 Or. 159, 164

Point 6.

It has been almost universally held that when the vacated part is beyond the next connecting highway from the plaintiff's property so that he has access in both directions, there is no damage or injury within the legal meaning of these terms.

Lewis Em. Dom. 3rd Ed. Sec. 207, and cases cited.
McQuillin Mun. Corpn. Vol. 3, Sec. 1409
Whitsett vs. Union Deposit Co. 10 Colo. 243, 249
East St. Louis vs O'Flynn, 119 Ill. 200, 10 N. E. 395
Henderson vs Lexington, 132 Ky. 390, 111 S. W. 318
Baudistel vs Mich. C. R. Co., 113 Mich. 687
Kimball vs Homan, 74 Mich. 699
Newart vs Hatt, 79 N. J. L. 548
Re Ruscomb Street, 30 Pa. Sup. Ct. 476
Brown vs San Francisco, 124 Calif. 274

Point 7.

Measured by this standard, the plaintiff in this suit has no claim which he can enforce either in equity or law. The latest expression of the Supreme Court of Oregon is to the effect that the plaintiff in order to show a cause of action or suit must show that the effect of the vacation has been to work some proximate, immediate, and substantial injury to the value of his real estate.

Sandstrom vs O-W etc. Co., 75 Or. 159, 167

ARGUMENT.

Point 1.

Nothing in the relationship of the Oregon Real Estate Co. with the appellant, Lockwood, incident to the sale and purchase of the appellant's property in Holladay Addition can be deemed to work an estoppel against the company. At the time that this sale and purchase was made the statute relating to the vacation of streets in incorporated towns, namely: section 3824, was in force, and had been in force since its adoption in 1864, together with a somewhat similar provision in the charter of the City of Portland. Section 3824 Oregon Laws, reads as follows:

> "In cases where any person interested in any corporated town in this state, the corporate functions of which shall be in active operation, may desire to vacate any street, alley, or common, or part thereof, it shall be lawful for such person to petition the common council or other body in like manner as persons interested in towns not incorporated are authorized to petition the county court; and the same proceeding shall be had thereon before such common council or other corporate body having jurisdiction as authorized to be had before the county court, and such common council or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provision of this act.".

By the terms of this statute, which must be considered as entering into and being a part of the agreement for the purchase and sale of said property, it is stipulated that it shall be *lawful* for the owner of any portion of a plat to petition for a vacation of any street therein. In the present instance it should be further noted (plaintiff's Exhibits "C" and "D") that the Oregon Real Estate Co. was not the petitioner for this vacation, but merely gave its consent upon the petition of School District No. 1. It may also be noted that the Oregon Real Estate Co. was not a free agent in the sale of Blocks 95, 97 and 98 to the school district. It is true that the purchase was made by the school district with the understanding that the company would give its consent to the vacation of the streets in question, but the property would have been taken from the company by the district in any event. The district in acquiring property for school purposes may exercise the right of eminent domain. (Sec. 4983, Oregon Laws.)

> "Sec. 4983: Whenever it may be necessary for any school district in this state to acquire any real property for schoolhouse site, or other necessary school purposes, and the owner of said real property and the board of directors of said school district cannot agree upon the price to be paid therefor, and the damage for the taking thereof, if any, the district boundary board of the county in which such real property desired for school purposes lies, may and is hereby authorized,

upon the written request from the board of directors of such school district, to commence and prosecute in the circuit court for said county the same as other actions and suits are brought, in the name of such school district, any necessary or appropriate suit, action or proceeding for the condemnation of said real property so required for said purposes, and for the assessment of the value and the damage for the taking thereof, and the title acquired by any school district by any such suit, action or proceeding shall be a fee simple title; and the district attorney of the judicial district in which such property (to be) condemned lies, shall act as attorney for said district boundary board in all proceedings in the circuit court, as in other causes in which the state of county is a party or interested. The procedure in said suit, action or proceeding shall be, as far as applicable, the procedure provided for in and by the laws of this state for the condemnation of land or rights of way by public corporations or quasi-public corporations for public use or for corporate purposes."

The board of directors had proceeded according to this statute to this extent: It had determined that the property was necessary for school purposes, and had determined to acquire it for such purpose. Acting in accord with the statute, it had entered into negotiations with the owner and had been able to "agree upon the price to be paid therefor." This relieved the board of the necessity of condemning the property, but nevertheless the owner was under compulsion to part with his

property, either by contract or by judgment of the court, in view of the fact that the district had determined upon its acquisition. It may be further noted that the Oregon Real Estate Co. has not been partisan in this matter. It has not entered an appearance in this suit, indicating that it feels that the burden of acquiring this property for school purposes still remains with the school district.

The statutes of Oregon do not require that public necessity be shown before county or municipal authorities may vacate a street. Section 3821 Oregon Laws, provides that such authority may, *if in their opinion justice require it,* grant the prayer of the petitioner in whole or in part. However, in any event, the vacation of the streets in question was for a public purpose.

> "The abolition of grade crossings, the construction or improvement of railroad depots and terminals, and the re-arrangement of streets to secure a more regular and harmonious system, are public purposes for which the power of vacation may properly be exercised. So where the vacation is for public or quasi-public buildings or grounds. Lewis Eminent Domain (3rd Ed.) Sec. 209, page 398."

Point 2.

The Oregon courts recognize that the owner of property which is actually damaged by the vacation of the street on which it abuts may have

his remedy. Mr. Justice Burnett, in the case of Sandstrom vs. O-W etc. Co., 75 Or. 159, at page 162, says:

> "It was established, as stated in the answer, that the public authorities had given permission for the construction of the railway. The effect of this is thus stated in 1 Lewis, Eminent Domain (3 ed.), Section 169, page 304:
>
> " 'Authority to occupy a street, whether obtained directly from the legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street and leaves the company to deal with private rights as in other cases.' Muhlker v New York & Harlem R. R. Co., 197 U. S. 544 (49 L. Ed. 872, 25 Sup. Ct. Rep. 522).
>
> "In other words, the sanction of local authorities exonerates the company from the charge of maintaining a public nuisance, but does not affect the damages to be assessed for the invasion of private rights."

But in the same opinion the court holds that the vacation must work some "proximate, immediate and substantial injury to the value of the real estate". To the same effect is Willamette Iron Works vs. O. R. N. Co., 26 Or. 232, Kurtz vs. So. Pac. 80 Or. 213.

Point 3.

The appellant's chief reliance is upon the so-called "unit rule" whereby he asserts an easement

over every thoroughfare and street shown in the plat, whether such thoroughfares and streets are, or are not, necessary or convenient for ingress to or egress from his property.

This rule is not the law in Oregon and is declared by all text writers to be the view only of a small minority of the courts of the land.

> "When land is sold by reference to a plat upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the street or way upon which his lot is situated and in such other streets or ways as are necessary or convenient to enable him to reach a highway. He acquires no easement in any street or way which his land does not touch and which does not lead to a highway; and he is not entitled to an injunction or other remedy by reason of the obstruction of such street or way". Jones on Easements, Sec. 347, and cases cited.

> "In some jurisdictions, upon the principle that the map or plat is a unity, and that the purchaser of a lot buys on the implied condition and understanding that all the streets and ways shown thereon will be available for public use and not merely the street upon which his property abuts, it is held that the purchaser of a lot acquires a right or easement in *all the streets and alleys* shown on the plat or map, and can insist that all these streets and alleys shall be kept open and devoted to public use. Hence, when such a plat has been made and lots have

been sold with reference thereto, the owner of the land by whom the plat was made cannot, without the consent of each and all of his purchasers or their grantees, vacate a part of the streets dedicated. But this construction of the effect of a sale of property according to a map or plan prepared by the owner is rejected in some jurisdictions, and it is held that the purchaser of lots is only entitled to have that portion of the street which borders his premises kept open at both ends. This does not mean, however, that the purchaser is entitled to have the street kept open at each end no matter how remote the ends are from his property. The condition is complied with if there is access to a *cross street in each direction.* This construction is reached upon the ground that in the absence of an express grant, a grant by implication of an onerous servitude upon the land of grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties." Dillon, Municipal Corporations, 5th Ed. Sec. 1084.

"According to some authorities, such purchaser under the plat acquires the right to have all the streets and alleys laid down on the plat kept open and to that extent has a private right in each and all of the streets and alleys in the sub-division. But the prevailing rule is that the purchaser of a lot according to a plat acquires an easement only in such streets and alleys laid down on the plat as are necessary for the reasonable and convenient enjoyment of the lot conveyed. This rule fixes no precise limit to the private

> rights acquired but the reasonable application of the rule would include such streets and parts of streets as give value to the lot and the loss of which would render the lot less valuable to use or sell. The grant, according to well recognized principles, should be construed in favor of the purchaser and he should be held to acquire all that is fairly necessary for the enjoyment of the property conveyed. Some cases hold that the purchaser acquires the right to have the street which his property abuts kept open to the next connecting street in each direction and no further." Lewis Eminent Domain, (3rd Ed.,) Sec. 198, and cases cited.

Many decisions of the Massachusetts court sustain the conclusion of the text writers.

Holmes J. in Pearson vs. Allen, 151 Mass. 79, says:

> "The only question worthy of discussion is whether the private rights of way, if any, to which the plaintiff is entitled by reason of the reference to the plan in her deeds extend to Center Avenue. We are of the opinion on the whole that they do not. The cases here and elsewhere show that there are limits to the easements raised by way of implication even if there are not limits to the power of creating easements when it is attempted by express words. A reference to a plan like this, laying out a large tract, does not give every purchaser of a lot a right of way over every street laid down upon it."

In the case of Horton vs. Williams, 99 Mass. 423, 428, the court said:

> "It can hardly be said that the easement acquired by such a conveyance is a mere right of way in the street frontgae only. What is acquired is a right of ingress and egress and such access as the plat and dedication provide. * a right of way in the streets upon which the lot abuts. It is not a license merely but an easement appurtenant to and running with the land. It does not arise alone from the necessities of the grantee and lie by implication, but rests in express grant, evidenced by the conveyance referring to the plat."

In Regan vs. Boston Gas Light Co. 137 Mass. 37, 42, the court said:

> "This deed conveyed to Foster the fourth lots owned by plaintiff, bounded on Union Street, Neponset Street, and Commercial Street, 'also the streets for public highways, as by a plan recorded in register's office for benefit of all concerned, drawn by Mather Withington.' This deed cannot be construed as an express grant of rights of way over all the streets shown on the plan, the words 'the streets for public highways' clearly referring to the streets before named in the deed. Can it fairly be construed as a grant by implication of such rights?
>
> "What is the purpose and effect of a reference to a plan in a deed, is a question of the intention of the parties. In the absence of an express grant, a grant by

> implication of an onerous servitude upon other land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless such is clearly the intention of the parties."

In Hawley vs. Baltimore, 33 Md. 270, which is the leading case in Maryland upon this subject, it is said:

> "The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets he thereby dedicates the streets so laid out to public use. The rule is founded on the doctrine of implied covenants and the dedication will be held to be co-extensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. In the case before us the right of way or easement in Mosher street acquired by the purchasers of the lots mentioned in the proof is the precise limit of the dedication by Hiss. Over what portion of Mosher street then did their right of way exist? We think they acquired by their several purchases the right of way only from Madison avenue to McCulloh street, as it is between those streets that their lots lie and bind on Mosher. The doctrine of implied covenants will not be held to create a right of way over all of the lands of the vendor which may lie, however remote, in the bed of a street. The lands must be con-

> tiguous to the lot sold and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed and no further."

In the case of Baltimore vs. Frick, 82 Md. 77, the same rule was applied by the court as follows:

> "If in a deed conveying land it is described as fronting or binding on an unopened street, owned by the grantor, which street is designated on a public map or private map, such description generally operates as a dedication of the street. The purchaser is entitled to a right of way over it to its full dimensions only until it reaches some other street or public way and the street which limtis the dedication is the next existing public street, whether the same be actually used as such or not."

The rule laid down by the Supreme Court of Michigan is contained in the decision of the case of Diamond Match Co. vs. Ontonagon, 72 Mich. 249, 259, as follows:

> "As between individuals so purchasing and the proprietor, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property purchased by them kept open

> for their own and the public's use. But such proprietor is not estopped from reclaiming or shutting up any street or portion thereof delineated on his map where private rights are not directly affected."

In Thorpe v. Clanton, 10 Ariz. 94, 85 Pac. Rep. 1061, the Supreme Court of Arizona rejected the view that a person purchasing lots according to plat acquired an interest in all the streets shown on the plat, and held that where a part of the streets were fenced in and closed, such purchasers could not compel the opening of the streets without showing that their property was specially damaged. See also, Bell v. Todd, 51 Mich. 21; State v. Hamilton, 109 Tenn. 276, Jackson vs. Birmingham Foundry and Machine Co. 154 Ala. 464, 45 So. Rep. 660.

It will be noted that in many of the cases above cited, the courts base their decision upon the ground that in the absence of an express grant, a grant by implication of an onerous servitude upon the land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties.

The Supreme Court of Kansas rejects the "unit rule" in the case of Highbarger vs. Milford, 71 Kans. Sup. Ct. Rep., 331, 340, where it was said:

> "While we do not think that when one purchases a parcel of ground bounded by a laid-out and dedicated street, in a given

platted parcel of land, he thereby necessarily becomes vested for all time with the right to travel over and along all of the streets and alleys of such platted parcel of ground, or over all the streets that it would be convenient for him to use, we do think that he obtains the right to the use of such streets as are reasonably necessary for the enjoyment of the land so purchased by him. These streets are ordinarly such as bound the block in which his land is situated, or such as furnish access to his property from either direction, and there is no reason to limit this ordinary rule in this case."

In the case of City of East St. Louis vs. O'Flynn, 206 Ill. Rep., 200, 206, it was said:

"Here, plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street front of the alley in the rear of his property remains open as before, according the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the *'same kind'* of damage that would be sustained by all other persons in the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action. The court very properly instructed the jury, for defendant, 'that, for

> the vacation mentioned in that ordinance, the defendant is not liable to plaintiff for any consequential damage that may have resulted to his lot therefrom, and defendant is not liable, in this action, for anything alleged in the declaration in this case done by the St. Louis and Cairo Railroad Company, which company was not authorized to do by said ordinance'."

Points 4 and 5.

The appellant has contended that the unit rule has been adopted by the courts of Oregon and cites Steele vs. City of Portland, 23 Or. 176, and Carter vs. Portland, 4 Or. 339, both of which are cases in which the court was called upon to preserve park spaces from the encroachments of the dedicators. Strong language has been used by the courts of various jurisdictions under similar circumstances. 19 C. J. 935, and cases there cited.

However, in construing the rights of a lot owner in a platted district, the Supreme Court of Oregon, in the case of Sandstrom, vs. O-W etc. Co., 75 Or. 159 at 163, lays down the following rule:

> "Having purchased the property with reference to the dedicated streets appearing on the plat, the plaintiff was entitled to the use of those highways as an appurtenance to his premises. In common with the general public residing in other parts of the city or state, he had a right to travel along Newark street without let or hinderance. For the invasion of the mere

right to travel, as thus far stated, he is barred from recovery by the municipal legislation mentioned; but, as he passed along the street with other members of the general public, he had a privilege which no other person possessed, to-wit: that of entering upon his close from that street, and prior to the construction of the road, in the exercise of his prerogative, he could approach his premises from the east as well as from the west. The defendant is in the position of saying to him in substance:

"'Although you had the right, before we came upon the ground, to go to your residence both from the east and from the west along Newark street, yet in our judgment it is enough for you if you can reach it from the west, and we will therefore appropriate your eastern approach for ourselves.'

"There is a palpable invasion of the plaintiff's right of access to and egress from his premises. If it is found in principle to allow this without compensation in damages, the company could as well take from him both approaches. The complaint discloses that the plaintiff has suffered an injury not common to the general public but peculiar to himself, whereby he has been deprived of part of his convenient method of access to and egress from his realty."

This expression of the Supreme Court, which is a clear, concise and comprehensive definition of the rights of a lot owner in a platted district, does not contain the chief element of the unit

rule as contended for by the appellant, and is decisive of the case at issue. The rights of the lot owner by this definition do not include an easement private in nature over every thoroughfare and street shown upon the plat, but is limited to those immediately surrounding or convenient for approach to his property.

Point 6.

The vacated streets lie beyond the first intersection and in the next block from the appellant's property. The street on which the appellant's lots front will remain open from end to end. No obstruction is threatened to any of the frontage on the entire block in which they are situated. One of the streets vacated lies more than two hundred feet from the appellant's property, and the other is across the intersection. The authorities are unanimous that in situations of this kind the lot owner suffers no damage or injury within the legal meaning of these terms.

> "When the vacated part is beyond the next connecting highway from the plaintiff's property so that he has access in both directions, it is held by all the authories that there is no taking of the plaintiff's property, though the closing of the street at the point in question renders his property less valuable." Lewis Eminent Domain, (3rd Ed.) Section 207, and cases cited.

Many of the decisions above quoted hold to this rule, and others could be collected without number.

> "There is no doubt but a property-owner has an easement in a street upon which his property abuts, which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief." Bailey v Culver, 84 Mo. 531.

In Reis vs. New York, 188 N. Y. 58, 68, it was said that the vacation of a part of a street has been to give no rights to a property owner on the street in another block, there being cross streets on both ends of his block, and it was said:

> "While the city may not close the street so as to prevent access to the plaintiff's premises, without a trespass, it is enough if access to the plaintiff's lot is preserved although such access may not be quite so convenient as it would be if the street were allowed to remain open."

Measured by the standard laid down in these cases, the appellant has no claim which he can enforce either in equity or at law. The only in-

jury which he has sustained is one which he suffers in common with the rest of the traveling public.

It is said by the court in Sandstrom vs. O-W etc. Co., supra, (page 163):

> "The principle indeed, is well established that, for an injury which an individual sustains in common with the general public, he cannot complain, although he may suffer more acutely than the rest of the people. In such cases he must find his relief, if at all, at the hands of the state by public prosecution."

The equities claimed by the appellant are obscure and doubtful. Ostensibly he is concerned about the closing of the streets in question. Viewing the result of the closing it may be questioned that he is entirely frank in his contention. Holladay Addition is a residential district, with blocks two hundred feet in length. Obviously no great inconvenience would be suffered by the lot owners if the blocks were three times as long. The result of the closing of the streets in question is to create a block four hundred and sixty feet long, not an excessive length in a residential district.

The property in question has been acquired by the school district for the erection of a twenty room, modern school building to accommodate a large enrollment of pupils. It is to replace a building which was burned a year ago. A single block could scarcely accommodate the building,

leaving no space for play ground. The necessity for larger school grounds to keep the children off the streets and away from traffic has been recognized by the district which is adhering to the rule that no new building shall be erected on lots which do not furnish adequate play space. It may be fair to assume that the motive of the plaintiff in this suit is found in paragraph VI of the appellant's supplemental complaint. (Abstract of record, p. 81.) He does not want the school located at this point. Paragraph VI reads as follows:

> "That the defendant School District threaten to use all of the vacated portion of said streets for school purposes and to erect and construct and maintain on the property acquired by it from the defendant Oregon Real Estate Company a public school building or buildings and playgrounds, and by the maintenance of such public school building and playgrounds and the devotion of said property so acquired by said School District from the Oregon Real Estate Company, the property (68) of this plaintiff heretofore described herein will be greatly depreciated in its value, in its marketability, and in its salability, to plaintiff's damage, and the damage so inflicted upon plaintiff's property is peculiar and personal to himself and his property, and it is a damage of a different kind to that suffered by the general public by the erection and construction of said school buildings and by the appropriation of said property for schoolhouse purposes and school playground purposes as aforesaid."

The use of the property for the establishment of a school is a public use and the appellant has shown no authorities which would indicate that he is entitled to damages for the location of the school in his neighborhood. It might be further suggested that it is to the appellant's actual advantage that the streets be vacated and the school be located on the larger tract rather than upon a single block fronting his property. With the larger area the building will be placed at a greater distance from the property of the appellant, and the noise created by the children at play centralized at a point further removed from his premises.

For these reasons we respectfully submit that the decree of the lower court should be affirmed.

Respectfully submitted,

STANLEY MYERS, District Attorney,

SAM'L H. PIERCE, Deputy District Attorney,

Attorneys for School District No. 1, and its officers, Appellees.